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No. 04-163

IN THE

Supreme Court of the United States

LINDA LINGLE, Governor of the State of Hawaii, and MARK J. BENNETT, Attorney General of the State of Hawaii,
Petitioners,

v.

CHEVRON USA, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a court may invoke the Just Compensation Clause to resurrect heightened scrutiny and invalidate state economic legislation through de novo second-guessing of the State's judgment as to the law's wisdom and efficacy.

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INTEREST OF THE *AMICI CURIAE*

Amici's members include state and local governments and officials throughout the United States.[1] These officials design, enact, and implement a broad array of health, safety, land use, and other economic regulations to promote the public good. *Amici* thus bring a vital perspective to regulatory takings challenges to these protections, and have submitted friend-of-the-court briefs to this Court in many takings cases. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Amici's members have a compelling interest in preserving their police power authority to adopt reasonable regulations and in ensuring that courts refrain from improperly second-guessing the wisdom of such legislative policy judgments. Reversal of the ruling below will eliminate the need for *amici*'s members to expend limited resources defending constitutional challenges rooted in an intrusive level of scrutiny for economic regulation unprecedented in modern times. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Amici agree with Petitioners Lingle and Bennett that the heightened means-end scrutiny applied by the court of appeals to invalidate Act 257 is not a proper test of regulatory

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk of the Court.

takings liability and that the correct standard for judicial review of economic legislation is the rational basis test under the Due Process Clause. *Amici* will not duplicate Petitioners' analysis in this brief, but instead offer two arguments that support reversal of the judgment below.

1. Adoption by this Court of the theory applied by the court of appeals—that heightened means-ends scrutiny is a proper test for regulatory takings liability—could inundate the federal courts with challenges to a wide range of state and municipal regulations. Although this case involves a rent control law, the court of appeals held without qualification that heightened scrutiny extends to all land use regulation subject to challenge under the Just Compensation Clause.

Moreover, the implications of the holding below extend well beyond land use regulation. There is no principled basis for limiting heightened means-ends scrutiny under the Just Compensation Clause to the regulation of real property. This Court's precedents include a number of cases in which economic regulations having nothing to do with land or land use have been challenged as regulatory takings. The Court has adjudicated takings claims asserted with respect to pension plan regulations, lawyers' trust accounts, coal industry health benefits, federal user fees, and laws regulating interest on interpleader funds. The lower federal courts have likewise entertained regulatory takings challenges to garden variety economic regulation.

Respondent argues that fears of the spread of heightened means-ends scrutiny are unfounded because the "substantially advance" formulation was articulated by this Court more than twenty years ago and no widespread upheaval has occurred in the federal courts. But this is because the lower federal courts generally have declined to apply this intrusive test. That would necessarily cease to be true if this Court affirms the judgment below and fails to make clear that rational basis review under the Due Process Clause is and long has been the

only appropriate test for judicial review of legislation such as Act 257.

Rational basis review has been applied by this Court to economic legislation for 70 years, and for reasons the Court has often stated. For example, in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), the Court rejected a due process challenge to a federal statute regulating milk shipments. It reasoned that "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis." *Id.* at 152. In a subsequent case, the Court "emphatically refuse[d] to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (citation omitted).

Under the heightened means-ends scrutiny applied by the court of appeals and urged upon this Court by Chevron, there would be no such deference to legislative judgments. Federal courts would be called upon to analyze complex economic and scientific data and to second-guess legislative policy judgments that underlie routine economic regulatory laws. Unless the judgment below is reversed, this Court could be compelled to reassess many of its regulatory takings rulings.

Supplanting rational basis review with heightened means-ends scrutiny would also alter the existing legal regime in several profound ways. Under rational basis review, a court may not invalidate a law on the grounds that the law might not succeed in achieving the legislature's goal. Nor is empirical evidence required to support a law challenged under this deferential standard. In addition, incremental legislative approaches to regulatory problems are clearly con-

stitutional under the rational basis test. Finally, the rational basis test does not require legislatures to articulate the reasons for enacting regulatory laws. All of these vital rules could change were this Court to affirm the application of heightened means-ends scrutiny to Act 257.

2. Reversal of the judgment below is also required because of the threat it poses to legislative authority, political accountability, and the effective working of our democratic institutions. Under our system of government, elected officials are responsible to the electorate and unpopular legislative choices can be remedied at the ballot box, thus ensuring the political accountability of elected officials. At the same time, deferential rational basis review is essential "'to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (citation omitted).

Heightened means-ends scrutiny of state and local legislation by federal courts would unduly federalize classic local exercises of the police power in matters such as health and safety regulation, land use controls, and economic regulation. Such a sea-change would also carry the risk of judicial policymaking under the guise of takings analysis, with courts substituting their own policy preferences for those of legislatures. Finally, such unwarranted judicial invalidation of legislation would undermine the effectiveness of our democratically elected institutions by devaluing the entire legislative process.

ARGUMENT

The opening brief for Governor Lingle and Attorney General Bennett convincingly demonstrates that the heightened means-end scrutiny applied by the Ninth Circuit to invalidate Act 257 is not a proper test of regulatory takings liability under the Just Compensation Clause. Rather, review of economic legislation should be conducted under the Due

Process Clause using the rational basis standard. The text, structure, and history of the Just Compensation Clause are fundamentally inconsistent with the use of the Clause to invalidate legislation by applying heightened means-end scrutiny. The arguments presented by the Governor and Attorney General for reversing the Ninth Circuit's ruling need not be repeated here.

Instead, this amicus brief supplements Petitioners' submission in two ways. In section I, *amici* show that affirmance of the appeals court's ruling and endorsement by this Court of heightened means-end scrutiny as a test for regulatory takings liability could inundate the federal courts with hundreds of challenges to state and municipal regulations. Section II demonstrates that heightened means-end scrutiny of economic legislation under the Just Compensation Clause is flatly inconsistent with appropriate deference to politically accountable legislatures and the role of courts in our democracy.

I. ADOPTION OF HEIGHTENED MEANS-END SCRUTINY UNDER THE JUST COMPENSATION CLAUSE COULD RESULT IN HUNDREDS OF NEW CHALLENGES TO STATE AND MUNICIPAL REGULATIONS.

The lower court rulings are aberrational in the extreme, affording none of the requisite respect to the State of Hawaii's executive and legislative branches regarding the wisdom and efficacy of Act 257. The trial court abandoned any pretense of deference to the State's legislative judgment. After receiving testimony from competing experts at trial, the court concluded that Act 257 would not benefit Hawaii consumers because, in the court's view, the economic theories presented by Chevron's expert were "more persuasive" than the State's position. Pet. App. 43. Based on this finding, it held that the Act fails to substantially advance

a legitimate interest and thus violates the Just Compensation Clause. *Id.* at 50-53.

The court of appeals affirmed, applying heightened scrutiny under the Just Compensation Clause (*see id.* at 6-17, 58-66). It expressly rejected the rational basis test typically applied to economic legislation under the Due Process Clause (*see id.*), and gave no deference to the views of the state legislature regarding the wisdom and efficacy of Act 257. *See id.* at 17-21.

In short, the lower courts invalidated Act 257 because they disagreed with the judgment of the State's elected officials that the measure would protect the interests of Hawaii's consumers. The lower courts preferred Chevron's economic views and rejected the State's legislative judgment as to the efficacy of Act 257, much as the *Lochner* Court concluded that New York's worker protection laws were unwise. *See Lochner v. New York*, 198 U.S. 45 (1905).

A. The Ninth Circuit's Ruling Implicates Numerous Economic Regulations.

The ramifications of the Ninth Circuit's ruling are breathtaking, applying not only to all land use regulation, but to general economic regulation as well. Although this case involves rent control, the appeals court was clear in holding that heightened scrutiny extends to all land use regulation subject to challenge under the Just Compensation Clause. *See* Pet. App. 7 ("[The] more deferential, due process standard does not apply to regulatory takings claims challenging land use regulations."); *id.* at 15 (substantially advance test applies to all land use regulation). The primary case cited by both the Ninth Circuit and Chevron to justify the substantially advance formulation - *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) - is not a rent control case, but instead a workaday zoning challenge that purports to articulate a general test for takings liability. Indeed, the court of appeals has applied

heightened scrutiny under the substantially advance formulation to other forms of land use controls.[2]

Application of heightened means-end scrutiny to all land use regulation would be disturbing enough. But the implications of Chevron's argument do not stop there. There is no principled basis for limiting heightened means-end scrutiny under the Just Compensation Clause to the regulation of real property. As this Court well knows, economic regulations having nothing to do with land also can be challenged as regulatory takings. The Court has entertained two regulatory takings challenges to pension plan regulations,[3] and it has considered other takings challenges to economic laws outside the context of land use controls.[4] The lower federal courts, too, have adjudicated many regulatory takings challenges to health and safety protections and other non-land use regulations.[5]

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[2] Pet. App. 12 (citing *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 965 (9th Cir. 2003)).

[3] *See Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641-47 (1993) (applying *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), to reject an as-applied challenge to withdrawal liability provisions); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-28 (1986) (applying the *Penn Central* factors to reject a facial takings challenge); *see also* pp. 12-14, *infra*.

[4] *E.g., Brown v. Legal Found. of Wash.* 538 U.S. 216, 240 (2003) (rejecting takings challenge to rules governing interest on lawyers' trust accounts); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522-37 (1998) (plurality op.) (sustaining as-applied takings challenge to regulation of coal industry health benefits); *United States v. Sperry Corp.*, 493 U.S. 52, 59-64 (1989) (rejecting takings challenge to user fee for Iran-U.S. claims tribunal); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-65 (1980) (sustaining takings challenge to law regulating interest on interpleader funds).

[5] *E.g., Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1183-96 (Fed. Cir. 2004) (applying *Penn Central* in takings challenge to food

The appeal court's ruling is truly a radical outlier, flying in the face of decades of this Court's precedents holding that *Lochner*'s exacting means-end test for economic regulation has been supplanted by the deferential rational basis test. Under the appeals court's approach, many economic or social regulations could be challenged by an affected property owner in the hope that the court would second-guess the wisdom of the legislative policy choices, deem the law ineffective, and invalidate it under the Just Compensation Clause.[6]

Chevron suggests there is no need to fear heightened means-end scrutiny under the Just Compensation Clause because the Court articulated the "substantially advance" test more than twenty years ago in *Agins*, and yet the sky has not fallen. *See* Opp. 17-18. But the sky has not fallen because courts have rarely applied the test. *See, e.g., Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999) (the *Agins* substantially advance formulation "has not had a fruitful life" outside of the narrow context of compelled dedications of land). As shown below at pp. 13-14, this Court has addressed several regulatory takings challenges without any reference to heightened means-end scrutiny. And the few lower courts that have applied the *Agins* test often use rational basis

safety regulations); *Coalition for Gov't Procurement v. Federal Prison Indus., Inc.*, 365 F.3d 435, 483-84 (6th Cir. 2004) (applying *Penn Central* to reject takings challenge by association of furniture manufacturers to increased furniture production by agency that manages federal inmate labor); *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000) (applying *Penn Central* to sustain takings challenge to state law that altered funding formula for workers' compensation fund).

[6] *See* Vikram Amar, *Rent Control In Hawaii Goes All the Way to the Supreme Court* (Nov. 3, 2004) ("If the Supreme Court wants to affirm the Ninth Circuit in the Chevron case, it is going to have to explain why we all shouldn't fear *Lochner*'s rebirth."), *available at* http://writ.news.findlaw.com/amar/20041103.html.

review, not heightened scrutiny.[7] Particularly during the six years since the severe criticism of the test by five Justices in the concurring and dissenting opinions in *Eastern Enterprises*,[8] lower courts have been understandably gun-shy about applying heightened means-end scrutiny.

Chevron might attempt to cabin its position by arguing that a takings claimant must identify a cognizable property interest allegedly taken by the challenged regulation. But Chevron's asserted property interest in this case appears to be nothing more than the alleged "right" to charge unregulated rent. (Plainly, Hawaii has not taken the service stations themselves, and Chevron does not seek compensation for any such taking.) With so weak a constraint, any aggrieved property owner could recast an alleged injury as a "taking" of the right to use its property in the way the challenged law prohibits. In many cases, the claimant could easily articulate some stick in the bundle of property rights that the claimant alleges has been taken by an inconvenient law, and thereby insist upon heightened scrutiny.

Moreover, takings claimants invoking Chevron's proposed heightened scrutiny often would not be subject to the ordinary ripeness requirements that apply to other claimants under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). There would be no requirement to pursue administrative remedies to determine the extent to

[7] *See South County Sand & Gravel Co., Inc. v. Town of S. Kingstown*, 160 F.3d 834, 836 n.3 (1st Cir. 1998) (concluding that takings and due process means-end inquiries are "interchangeabl[e]"); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1004-07 (Cal. 1999) (declining to apply heightened scrutiny in affirming dismissal of takings challenge to city rent control law).

[8] *See* 524 U.S. at 539 (Kennedy, J., concurring in part and dissenting in part); *id.* at 550 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting); *id.* at 553 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

which the challenged regulation burdens the claimant's property because the substantially advance formulation often does not turn on the extent of that burden. Nor would it be necessary to seek compensation in state court as typically required under *Williamson County* because plaintiffs could seek invalidation, as Chevron does here. As a result, under Chevron's theory plaintiffs often would go directly to federal court, bypassing available administrative and state court remedies. And as shown below, plaintiffs could clog the already overburdened federal judiciary with challenges to laws that would otherwise easily survive rational basis review.

B. Heightened Means-End Scrutiny Could Muddy Decades of Settled Law and Call Into Question Many Existing Business Regulations.

If this Court were to adopt heightened means-end scrutiny under the Just Compensation Clause, seventy years of settled law analyzing regulation under the rational basis test could be put at risk. More to the point, numerous comparable present-day economic regulations would be up for grabs.

For example, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court rebuffed a due process challenge to a law prohibiting shipment of skimmed milk compounded with fat or oil other than milk fat. Congress enacted the measure because it found these substitutes caused undernourishment and disease, especially in children. *See id.* at 148-50 & n.2. The Court did not allow reargument of the public health issue, stressing that "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis." *Id.* at 152.

If, however, a business claimed that a newly enacted public health or safety measure banning a product worked a taking of its inventory, under heightened means-end scrutiny a judge would be forced to decide whether the ban substantially advances the public good, reweighing precisely the same evidence considered by the legislature. Many public health and safety laws could be subject to such judicial re-evaluation.

Similarly, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the Court used the rational basis test to reject a due process challenge to a state law prohibiting an optician from fitting lenses without a prescription from an ophthalmologist or optometrist, even in the case of a broken lens. The district court invalidated the law as overbroad because an optician of ordinary skill could take a broken lens, measure its power, and reduce it to prescriptive terms. On appeal, this Court acknowledged that the law might be a "wasteful requirement in many cases." *Id.* at 487. It nevertheless ruled that "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Id.* The Court speculated that "the legislature may have concluded that eye examinations were so critical . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert." *Id.* at 487. Under heightened scrutiny, however, plaintiffs could claim that many present-day business regulations work a taking by devaluing their businesses, and insist that courts reweigh the legislative judgment to determine whether the laws are so wasteful that they fail to substantially advance a legitimate interest.

Likewise, in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court rejected a due process challenge to a state law designed to reduce abuses against distressed debtors by prohibiting the business of debt adjustment except as an incident to the practice of law. The Court recognized that reasonable people

could disagree over whether the law advanced the public interest, stating that "[u]nquestionably, there are arguments showing that the business of debt adjusting has social utility." *Id.* at 731. But it stressed that any such arguments are for the legislature, "emphatically refus[ing] to go back to the time when courts used the Due Process Clause to 'strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Id.* at 731-32 (quoting *Williamson*, 348 U.S. at 488).

Under heightened means-end scrutiny, however, there would be no such deference to the legislative judgment. Hundreds of business regulations could be challenged as a taking of the regulated property for failing to substantially advance a legitimate state interest. Federal judges would be called on to re-analyze complicated economic and scientific data and complex policy arguments to determine whether business regulations, health and safety laws, land use controls, and other federal, state, and local laws adequately advance the public interest. Regardless of the ultimate outcome on the merits, a burdensome trial frequently would be required because vexing factual issues would preclude dismissal or summary judgment.

C. Heightened Means-End Scrutiny Could Require this Court to Revisit Many Recently Decided Cases.

Recent constitutional challenges to federal economic regulation—such as the successive challenges to federal pension regulation in this Court—are also instructive. In 1984, the Court unanimously rejected a facial substantive due process challenge to withdrawal liability provisions in the federal statute governing multiemployer pension plans. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-34 (1984). The Court applied the deferential rational basis

standard for economic legislation set forth in *Skrupa* and *Williamson*, expressly declining to apply heightened scrutiny and concluding that the challenged provisions had a rational basis. *Id.* at 728-34.

Two years later, the Court unanimously rejected a facial challenge under the Just Compensation Clause to the same provisions. *See Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211 (1986). In so ruling, it did not apply heightened means-end scrutiny, or any means-end scrutiny at all. Rather, it evaluated the provisions under the familiar multi-factor test set forth in *Penn Central*. *See Connolly*, 475 U.S. at 224-28. The *Connolly* Court made no mention of the "substantially advance" formulation for takings liability. Justice O'Connor, joined by Justice Powell, wrote separately to observe that the challenged provisions as applied in a specific case might "be so arbitrary and irrational as to violate the Due Process Clause," (*id.* at 228), but despite this means-end concern, they did not raise any comparable means-end issue under the Just Compensation Clause.

Then in 1993, the Court unanimously rejected as-applied challenges to the same statutory provisions under both the Due Process Clause and the Just Compensation Clause. *See Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993). The Court's substantive due process analysis proceeded under the deferential rational basis test (*id.* at 636-41), and the takings analysis proceeded under *Penn Central*'s multifactor test. *Id.* at 641-47. Again, there was no mention of the "substantially advance" formulation or any other heightened means-end scrutiny.

These rulings—and in particular the parallel due process and takings analyses in *Concrete* Pipe—show beyond reasonable dispute that the Just Compensation Clause does not generally require heightened means-end scrutiny of economic legislation. The sole exception concerns compelled dedi-

cations of land, a special category of land use controls governed by the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). As this Court recently reaffirmed, it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use" because the test is "not designed to address, and is not readily applicable to" other kinds of regulation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999).[9] If the Court were to adopt a general test of heightened means-end scrutiny in this case, it could be forced to revisit not only *Connolly* and *Concrete Pipe*, but many other unsuccessful constitutional challenges to federal, state, and local regulation.[10]

[9] *See also Dolan*, 512 U.S. at 391 (applying rough proportionality test to compelled dedication of land); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (applying logical nexus test to compelled dedication of land). Compelled dedications of land raise unique issues because, as explained in both *Dolan* and *Nollan*, they implicate the doctrine of unconstitutional conditions, which has little application to most other forms of regulation. *See Dolan*, 512 U.S. at 385 (discussing how compelled dedications of land trigger the doctrine of unconstitutional conditions); *Nollan*, 483 U.S. at 837 (comparing compelled dedications to unconstitutional conditions imposed on free speech rights).

[10] *See, e.g., United States v. Locke*, 471 U.S. 84, 105-06 (1985) (applying rational basis test to reject due process challenge to federal requirements resulting in the forfeiture of mining claims); *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 475-79 (1985) (applying rational basis test to reject due process challenge to requirement that private railroads reimburse Amtrak for rail travel privileges).

D. Heightened Means-End Scrutiny Could Subject Lower Federal Courts to Lengthy and Burdensome Trials to Resolve Complex Policy Disputes.

A recent example of means-end scrutiny gone awry at trial illustrates the dangers of heightened review of economic legislation. In *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), sellers of spray paint and indelible markers filed a substantive due process challenge to a 1992 Chicago graffiti ordinance that banned the sale of those items within city limits. The district court held a six-day trial, which included testimony from two respected economists who asserted that the ban effectively raised the price of spray paint in Chicago and thus reduced its use. Nevertheless, the district court found that the ban was ineffective because it did not deter vandals from producing graffiti. *Id.* at 1126-27. The court therefore concluded it violated the plaintiffs' substantive due process rights. *Id.*

On appeal, the Seventh Circuit had little patience with the trial court's aggressive means-end inquiry and reversed. Writing for a unanimous panel, Judge Easterbrook emphasized that "holding the trial in the first place usurped the legislative power" because "a legislative decision 'is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at 1127 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993)). Although the trial court might have correctly concluded that the cost of the ordinance outweighed the benefits, these matters were irrelevant because "the Constitution commits their decision to the political branches of government." *Id.*

In describing the appropriate level of scrutiny under rational basis review, the court stressed that "to say that such a dispute [of fact] exists—indeed, to say that one may be *imagined*—is to require a decision for the state." *Id.* The

Seventh Circuit concluded by expressing considerable skepticism over the wisdom of the ordinance, but it dismissed these concerns by quoting Justice Scalia's admonition that "'a law can be both economic folly and constitutional.'" *Id.* at 1132 (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring)).

As *National Paint & Coatings* makes clear, heightened means-end scrutiny could result in a monumental waste of judicial resources. Cases addressing means-end challenges under the doctrine of substantive due process currently comprise only a tiny portion of the federal docket.[11] If this Court were to endorse heightened means-end scrutiny under the Just Compensation Clause, the number of means-end challenges could rise exponentially.

Indeed, supplanting rational basis review with heightened means-end scrutiny for economic regulation would alter the existing legal regime in several profound ways. First, under the rational basis test, a court may not invalidate a law simply because the law might not succeed in achieving the intended goal. *E.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (trial court's finding that ban on plastic milk

[11] Available statistics from the federal appellate courts are representative. In Fiscal Year 2003 (ending Sept. 30, 2003), there were 56,396 cases terminated by the federal appellate courts. *See* News Release, Administrative Office of the U.S. Courts, *Judicial Business of the Federal Courts in FY 2003*, at p. 5 (March 16, 2004), available at http://www.uscourts.gov/Press_Releases/judbus03.pdf. Of the roughly 25,000 reported and unreported appellate opinions issued during this period, only about 230 included the phrase "substantive due process." *Amici* arrived at this figure by conducting a search on the Westlaw electronic database according to the following parameters: "da(aft 09/30/2002 & bef 09/30/2003) & 'substantive due process'" in the "Courts of Appeals Cases—All Circuits after 1944" database, performed on Nov. 30, 2004. Presumably, of the 230 opinions that simply referred to substantive due process, an even smaller number resulted in a merits disposition of a substantive due process claim.

containers would not accomplish its goal of easing waste disposal did not compel invalidation because "States are not required to convince the courts of the correctness of their legislative judgments"). In contrast, the stated purpose of the "substantially advance" formulation is to find a taking of property where the challenged regulation does not adequately accomplish its goal. Under this approach, federal courts also would be forced to decide how long to wait before determining whether the challenged law has had an adequate opportunity to prove itself, an exceedingly indeterminate inquiry if ever there was one.

Second, under the rational basis test "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315; *accord Vance v. Bradley*, 440 U.S. 93, 110-11 (1979) (retirement age requirement not irrational despite absence of supporting empirical evidence). Under heightened means-end scrutiny, however, courtroom factfinding would be the order of the day, with armies of experts and reams of exhibits offered to show that the challenged regulation does or does not adequately advance the stated goals.

Third, to survive the rational basis test, a legislature need not "strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935). It "may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (citations omitted); *accord Williamson*, 348 U.S. at 489. Under the heightened scrutiny of the "substantially advance" formulation, however, a takings plaintiff could argue that any portion of an incremental approach does not adequately advance the stated legislative goal.

Fourth, because legislation survives the rational basis test if there is any conceivable basis to support the regulation, the Court "never require[s] a legislature to articulate its reasons for enacting a statute," and thus "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications*, 508 U.S. at 315. But under heightened scrutiny, the government would be required not only to articulate its reasons and goals, but also to show that the challenged law substantially advances those goals. Absent an express statement of legislative goals, courts would be called upon to delve into legislative motive, a notoriously hazardous inquiry courts are loath to undertake. *E.g.*, *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 216 (1983) ("[I]nquiry into legislative motive is often an unsatisfactory venture.").

The threat of numerous lawsuits seeking invalidation of statutes and regulations under the Just Compensation Clause would have a severe chilling effect on the ability of state and local officials to address a broad range of economic, social, and land use issues. *Amici* anticipate that plaintiffs would be creative in challenging community protections across the board. This potential chilling effect is not idle speculation but a hard reality for state and local officials.[12]

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[12] *See, e.g., Hearing on H.R. 2372 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Diane S. Shea, Associate Legislative Director, National Association of Counties) (*available at* http://www.house.gov/judiciary/shea0915.htm) (discussing the chilling effect that the threat of takings litigation has on small municipalities at the expense of neighboring property owners and the public interest). This testimony persuasively shows that expansive takings theories can have a severe chilling effect even where those theories are limited to land use regulation. Of course, if Chevron prevails here, heightened scrutiny would have a chilling effect not only on land use controls, but on economic regulation generally.

II. ADOPTION OF HEIGHTENED MEANS-END SCRUTINY OF ECONOMIC REGULATION WOULD UNDERMINE LEGISLATIVE AUTHORITY AND POLITICAL ACCOUNTABILITY.

Continued rejection of *Lochner*-esque scrutiny for economic regulation is critical to the structure of our constitutional democracy for several reasons. First, as this Court has noted repeatedly, the "formulation, execution, or review of broad public policy . . . go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quoted in *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991)). Elected officials make policy decisions with the interests of the citizens in mind and with full knowledge that unpopular choices can be remedied at the ballot box. As early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court recognized that legislative action is primarily constrained not by the courts, but by "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections." *Id.* at 197.

Rational basis review of economic legislation is essential to legislative authority and independence. "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937)). When courts override legislative choices, they insulate elected officials from accountability, removing issues from the public arena that would otherwise be sorted out through the electoral process. "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

The *Lochner* era is rightly criticized by scholars across the jurisprudential spectrum for its failure to respect the will of legislative majorities. *Compare* Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 48-49 (1990) (criticizing *Lochner* era cases for overriding legislative majorities) *with* Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 874 (1987) (same). And every Member of the Court has joined opinions criticizing the more searching scrutiny of economic regulation that characterized the *Lochner* era.[13]

These political process objections are especially weighty where, as here, there is no textual basis in the Constitution for greater judicial intrusion. As Justice Holmes observed, "the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., joined by Brandeis, J., dissenting).

Second, heightened means-end scrutiny under the Just Compensation Clause by federal courts would inappropriately federalize health and safety regulation, land use controls, and other economic regulation. Appropriate deference ensures that States and municipalities have the flexibility they need to be creative in addressing local issues and tailoring solutions

[13] *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Thomas, JJ.) (referring to "the discredited substantive-due-process case of *Lochner*"); *id.* at 701 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (describing *Lochner* as improperly limiting legislative flexibility without constitutional warrant).

to fit local conditions. By aggrandizing authority to federal courts, heightened scrutiny of economic regulation would impair the critical role of a State or local government to "serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Third, courts are ill-equipped to decide complex matters of economic policy. Legislatures have the resources and time to engage in complex fact-finding and analysis, which "are not wisely required of courts." *Pegram v. Hedrich*, 530 U.S. 211, 221 (2000); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (plurality op.) ("Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." (internal citations and quotations omitted)). This is especially true where the benefits of a given policy choice are controversial and the data supporting that choice are subject to different interpretations. As the Court made clear in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), "[t]he very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable." *Id.* at 513.

Fourth, because courts lack institutional competence to address complex policy matters, heightened scrutiny of economic regulation raises a serious risk of judicial policy-making under the guise of takings analysis, with judges advancing personal predilections at the expense of legislative judgment. The Court has emphasized that rational basis review of economic regulation is "a paradigm of judicial restraint" because "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" *Beach Communications*, 508 U.S. at 313-14 (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). As shown

in Section I above, a searching means-end inquiry into economic regulation is so open-ended that a judge's personal philosophy could tip the scales in any given case.

Fifth, undue judicial invalidation of legislative judgment undermines civic education and the participation of the citizenry in our democracy. In his classic work *The Least Dangerous Branch*, Professor Alexander Bickel reiterated James Bradley Thayer's concern that undue judicial intrusion corrodes the moral education of the people:

> "[T]he exercise of it [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."

Alexander M. Bickel, *The Least Dangerous Branch* 22 (1986) (citation omitted).

Judge Learned Hand articulated the same concern when he expressed fear that judicial Platonic Guardians would destroy the civic stimulus upon which our democracy rests: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." Learned Hand, *The Bill of Rights* 73 (1960).

In short, this Court should reject heightened scrutiny of economic regulation under the Just Compensation Clause for the same reasons it abandoned the heightened review of the

Lochner Era. Because the ruling below threatens a retreat to *Lochner*, it should be overturned.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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